IN THE
SUPREME COURT OF MISSOURI

SC 85175

STATE EX REL. FORD MOTOR COMPANY, KENNETH KING, BILLY GENSLER, CHARLES HITT, AND AMERICAN FAMILY INSURANCE COMPANY

Relators,

v.

THE HONORABLE MICHAEL P. DAVID, JUDGE
CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI

Respondent.

BRIEF OF RESPONDENT MICHAEL P. DAVID

Circuit Court of the City of St. Louis
Cause No. 012-00563
Division No. 1

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JURISDICTIONAL STATEMENT

This action involves the following questions: (1) whether Respondent, the Honorable Michael P. David, Presiding Judge of the Circuit Court of the City of St. Louis, can take any further action except to transfer the underlying case, Cause Number 012-00563, Pierce v. Ford Motor Company, et al. from the Circuit Court of the City of St. Louis to a county where venue is proper or (2) whether venue properly lies in the Circuit Court of the City of St. Louis because Relator American Family is a resident of the City of St. Louis and because Plaintiff either has valid insurance claims against American Family or had a reasonable belief under the law and evidence that valid claims existed at the time of the filing of her lawsuit and if so, (3) whether this Court should dissolve its Preliminary Writ of Prohibition. This Court has jurisdiction over this writ proceeding under Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff Sara Pierce filed this wrongful death and insurance action as the surviving spouse of Benjamin Pierce ("Decedent"). On September 6, 1997, Benjamin Pierce was killed when a fully or nearly fully assembled Ford Explorer being worked on, jump-started, operated and driven by Ford employees, Charles Hitt, Kenneth King and Billy Gensler ("The Co-employees") accelerated at nearly full throttle striking Decedent, dragging him several feet and fatally crushing him when the front of the Ford Explorer rammed into the rear of another vehicle.

According to Ford's own St. Louis Assembly Plant Fatality Report filed with the trial court:

> On Saturday 9/6/1997 at approximately 11:45 a.m. three employees were changing the carpeting on a right hand drive Explorer that had been driven to the final repair area. Right hand drive Explorers are equipped with floor console shifters. To provide sufficient clearance for carpet removal and replacement, the shifter was moved to low gear (away from the instrument panel). During the repair, the transmission shift cable locator clip was inadvertently disengaged from its bracket causing the shifter to indicate that the unit was in Park, while the transmission remained in a forward gear. Additionally, the replacement carpet was installed on top of the accelerator pedal, holding the pedal close to the floor.
>
> Upon completion of the carpet replacement, the employees assigned to the repair attempted to start the unit to drive it from the repair area. When the employees attempted to start the unit, it would not turn over. The employees began

troubleshooting the "no-start" condition by verifying that the shifter was placed in park and that electrical connections were established between the shifter/console and the unit. After verifying that the units shift indicator was in park, the employees bypassed the park/neutral switch safety circuit by over-riding the starter relay, allowing the unit to start at near wide open throttle and in gear. The unit surged forward striking Mr. Pierce, who was standing at the front of the vehicle. (Appendix A19-A20, St. Louis Assembly Plant Fatality Report).

Moreover, the Hazelwood Police Report which was also filed with the trial court indicated:

Charles Hitt stated that on this date he was sitting in a car at the hoist bay waiting for jumpstart to start the vehicle which he was sitting in. As soon as the jumpstart was initiated, the car took off at a high rate of speed. Hitt stated that he had both feet on the brake pedal but he could not stop the vehicle.

* * *

Gensler told this officer that he was working at the Ford plant this date when a red Ford Explorer's carpet needed to be replaced . . . The vehicle was driven to the hoist bay area so that carpet could be replaced with no problems . . . After the new carpet was installed, he was going to pull the car out of the bay but it would not start . . . They decided to try and jumpstart it through the relay, which bypassed the ignition switch. Hitt was inside the car with the key on . . . Gensler put the jumper in and the car started accelerating with open throttle and in gear. Gensler stated that Bennie Pierce was standing in front of the car and it lunged forward, knocking

him down and dragging him across the floor and hitting another parked Explorer. (Appendix A21-A32, Hazelwood Police Department Investigative Report).

None of the reports describe the Ford Explorer as an "unassembled" vehicle as Relators state in their Statement of Facts. (Appendix A21-A32, Hazelwood Police Department Investigative Report and Appendix A19-A20, St. Louis Assembly Plant, Fatality Report). In fact, Gensler states "The vehicle was driven to the hoist bay so the carpet could be replaced with no problems." (Appendix A21-A32, Hazelwood Police Department Investigative Report). The pictures taken of the Ford Explorer involved in the accident show that it was fully assembled. (Appendix A33-A40, Photographs of Ford Explorer).

The collision took place at the Ford Motor Company Assembly Plant in Hazelwood, St. Louis County, Missouri.

THE CLAIM AGAINST AMERICAN FAMILY

Plaintiff and Decedent were insured with American Family Mutual Insurance Company ("American Family"). They had numerous automobile liability policies which provided uninsured motorist coverage, medical payment coverage, and accidental death coverage. (Appendix A41-A50, American Family Insurance Policies). Prior to filing suit, Plaintiff corresponded with American Family and asserted claims for uninsured motorist coverage, medical payment coverage and accidental death coverage. (Appendix A51, A54, A55, Letters to American Family). American Family acknowledged that its' policies provided accidental death coverage, medical payment coverage and uninsured motorist coverage, but denied the claims.

In its letter dated October 12, 1998, American Family admitted that "our insured also had Automobile Accidental Death and Specific Dismemberment Benefits Coverage Endorsement of $10,000." (Appendix A52-A53, Letter dated October 12, 1998). American Family asserted that the accidental death coverage did not apply because the policy contained the following exclusions:

"This coverage does not apply to:

2. Bodily injury or death sustained in the course of any occupation by an insured person while engaged in the duties involving the:

   a. operation, loading or unloading of vehicle used to carry persons or property for the charge or a commercial vehicle.

   b. repair or servicing of vehicles.

6. Bodily injury or death sustained while occupying or when struck by:

   a. a vehicle on rails or crawler treads

   b. a farm type tractor or equipment designed for use off public roads, while so used

   c. a vehicle or trailer while parked for camping or housekeeping purposes

   d. a vehicle while preparing for or taking part in a prearranged or organizing racing or speed contest.

8. Bodily injury or death sustained while occupying a motorized vehicle with less than four wheels." (Appendix A52-A53, Letter dated October 12, 1998).

Plaintiff also asserted a claim under the Medical Expense Coverage of her American Family policy. In its letter dated October 12, 1998, American Family acknowledged Plaintiff's claim for Medical Expense Coverage under her American Family car policy #01-755373-01:

> "We will pay reasonable medical expenses for appropriate and necessary medical and funeral services performed within one year of the accident because of an accident related bodily injury to an insured person.
>
> However, EXCLUSIONS, state:
>
> This exclusion does not apply for bodily injury to any person:
>
> 6. During the course of employment if benefits are payable or must be provided under the workers compensation or disability benefits law or any similar law." (Appendix A52-A53, Letter dated October 12, 1998).

However, on December 21, 1998, American Family denied Plaintiff's claim for medical expense coverage under the above exclusion. (Appendix A56, Letter dated December 21, 1998).

Plaintiff also made a claim for Uninsured Motorist (UM) Coverage under her American Family car policy. American Family denied the UM Coverage stating "we have no evidence of an uninsured motor vehicle being involved. Therefore, we will be unable to consider any payment for the death of Benjamin Pierce." (Appendix A56, Letter dated December 21, 1998).

At no time did American Family ever deny coverage on the basis that the Ford Explorer was not a motor vehicle.

THE LAWSUIT

Plaintiff filed her wrongful death lawsuit on February 21, 2001 against Ford Motor Company ("Ford"), and decedent's co-employees King, Hitt, and Gensler, ("The Co-employees") who had been working on, jump-starting, and operating the Ford Explorer. Suit was filed against American Family Mutual Insurance Company ("American Family") based on its policies for uninsured motorist coverage (Count X), medical expense coverage (Count XI) and accidental death benefits (Count XII). (Appendix A57-A76, Plaintiff's Petition). American Family maintains offices in the City of St. Louis for the sale of insurance and is therefore a resident of the City of St. Louis. (Appendix A77, St. Louis Yellow Pages, p. 774).

DEFENDANTS' RESPONSES TO THE PETITION

American Family filed its Answer to Plaintiff's Petition on April 10, 2001. However, American Family did not file a Motion to Dismiss or Motion to Transfer for Improper Venue within thirty days of service. Initially, American Family did not challenge the propriety of Plaintiff's uninsured motorist, accidental death or medical payment claims against it.

On April 2, 2001, Ford and The Co-employees filed Answers to Plaintiff's Petition. Ford and The Co-employees were served with the summons and Petition by mail on or about February 28, 2001. However, contrary to their assertion in their Statement of Facts, Ford and The Co-employees did not file a Motion to Transfer for Improper Venue and Suggestions in Support until August 23, 2001 which was not timely filed within thirty days of service. (Appendix A78-A81, Affidavit of Mariano Favazza).

In fact, it was only after Plaintiff's counsel advised Ford in a letter sent on July 31, 2001 that a search of the court file had revealed that no Motion to Transfer had been filed, that Ford and The Co-employees filed a Motion to Transfer without serving a copy on or giving notice to Plaintiff. (Appendix A82-A83, Letter dated July 31, 2001). In the Motion to Transfer for Improper Venue, Ford and The Co-employees asserted that American Family was pretensively joined to create venue, claiming that there was no uninsured motor vehicle case because the Ford Explorer was not a "motor vehicle".

Despite the untimeliness of the Motion to Transfer, the court heard the Motion to Transfer and denied it on the basis that "these defendants [Ford and The Co-employees] lack standing to seek dismissal on behalf of co-defendant American Family, which has not filed a dispositive motion and which remains a resident defendant in this case." (Appendix A1-A4 , Order of May 9, 2002).

Eventually, at the Court's suggestion, on May 23, 2002, American Family did file a Motion to Dismiss the various claims against it, but never filed a Motion to Transfer for Improper Venue. (Appendix A91-A99, American Family's Motion to Dismiss). On May 28, 2002, Ford and The Co-employees filed a Motion to Reconsider the Court's Order Denying their Motion to Transfer without Prejudice. On October 17, 2002, American Family's Motion to Dismiss and Ford's Motion to Reconsider were argued and taken under submission by the trial court. (Appendix A100, Order dated October 17, 2002).

THE COURT'S ORDER

On November 18, 2002, Judge Margaret M. Neill, issued an Order and Partial Judgment dismissing Plaintiff's UM claim against American Family on the grounds that "The Court does not believe that the Ford Explorer is, under Missouri law and the public policy surrounding the MVFRL and the statutory requirement of UM coverage, an uninsured motor vehicle, prior to its release from production, origination, and titling." The Court denied American Family's Motion to Dismiss Plaintiff's claim for Medical Payment finding that "American Family assumes that a workers compensation claim is pending; however, there is no evidence in the record to this effect, and the Court cannot conclude as a matter of law that this exclusion is applicable" and also ruling that the term "highway vehicle" referred to under the medical expense coverage is ambiguous. The Court denied the Motion to Dismiss the Accidental Death claim finding that "the term 'land motor vehicle' is ambiguous in the same manner as the term 'highway vehicle'. Clearly the Ford Explorer is a vehicle designed for land use. Moreover, the vehicle does not appear to fall within the vehicles excluded from accidental death coverage." (Appendix A5-A17, Order and Partial Judgment dated November 18, 2002).

Ford's Motion to Reconsider its Motion to Transfer was also denied. The Court denied transfer ruling that "Moreover, as discussed above, there is ample evidence to support Plaintiff's good faith belief in the validity of her claims against American Family. See, State ex rel. Cross v. Anderson, 878 S.W.2d 37, 38(Mo.banc 1994)". (Appendix A5-A17, Order and Partial Judgment dated November 18, 2002).

PETITION FOR WRIT OF PROHIBITION

On January 24, 2003, Ford, The Co-Employees, and American Family filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern District. The Missouri Court of Appeals denied the Petition on January 30, 2003. (Appendix A101, Order dated January 30, 2003). Thereafter, on March 25, 2003, Ford, The Co-employees, and American Family filed a Petition for Writ of Prohibition with the Missouri Supreme Court. On April 22, 2003, the Missouri Supreme Court issued its Preliminary Writ in Prohibition. (Appendix A102, Preliminary Writ of Prohibition dated April 22, 2003).

Plaintiff has not appealed the dismissal of her UM cause of action against American Family because the Medical Payment and Accidental Death causes of action were allowed to remain pending. See Rule 74.01(b) MRCP.

POINTS RELIED ON

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE:

A. PLAINTIFF HAS NOT PRETENSIVELY JOINED AMERICAN FAMILY BECAUSE PLAINTIFF HAS A VALID CAUSE OF ACTION AGAINST AMERICAN FAMILY FOR EITHER UNINSURED MOTORIST BENEFITS, MEDICAL PAYMENT BENEFITS, OR ACCIDENTAL DEATH BENEFITS;

B. PLAINTIFF HAD A GOOD FAITH BELIEF IN THE VALIDITY OF HER CLAIMS AGAINST AMERICAN FAMILY;

C. AMERICAN FAMILY HAS NEVER FILED A MOTION TO TRANSFER FOR IMPROPER VENUE AND THEREFORE HAS WAIVED ANY CHALLENGE TO VENUE; AND

D. RELATORS FORD, KING, GENSLER AND HITT FILED THEIR MOTION TO TRANSFER FOR IMPROPER VENUE OUT OF TIME IN VIOLATION OF RULE 51.045 MRCP AND THEREFORE VENUE IS WAIVED.

State ex rel. Smith v. Gray, 979 S.W.2d 179(Mo.banc 1979).

Viessman v. Allstate Insurance Company, 825 S.W.2d 349(Mo.App.S.D., 1992).

State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994).

Stronger v. Riggs, 85 S.W.3d 703(Mo.App.W.D. 2002).

ARGUMENT

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE:

A. PLAINTIFF HAS NOT PRETENSIVELY JOINED AMERICAN FAMILY BECAUSE PLAINTIFF HAS A VALID CAUSE OF ACTION AGAINST AMERICAN FAMILY FOR EITHER UNINSURED MOTORIST BENEFITS, MEDICAL PAYMENT BENEFITS, OR ACCIDENTAL DEATH BENEFITS;

B. PLAINTIFF HAD A GOOD FAITH BELIEF IN THE VALIDITY OF HER CLAIMS AGAINST AMERICAN FAMILY;

C. AMERICAN FAMILY HAS NEVER FILED A MOTION TO TRANSFER FOR IMPROPER VENUE AND THEREFORE HAS WAIVED ANY CHALLENGE TO VENUE; AND

D. RELATORS FORD, KING, GENSLER AND HITT FILED THEIR MOTION TO TRANSFER FOR IMPROPER VENUE OUT OF TIME IN VIOLATION OF RULE 51.045 MRCP AND THEREFORE VENUE IS WAIVED.

STANDARD OF REVIEW

Prohibition is a discretionary writ and there is no right to have the writ issued. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 856-57(Mo.banc 2001); State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 169(Mo.banc 1999). Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. Linthicum at 857; State ex rel. York v. Daugherty, 969 S.W.2d 223, 224(Mo.banc 1998).

ARGUMENT

Prior to the filing of her lawsuit, Plaintiff asserted claims for uninsured motorist coverage, accidental death benefits and medical payments against Defendant American Family. (Appendix A51, A54, A55, Letters to American Family). Plaintiff had a reasonable belief that she could prevail on her insurance claims against American Family. Plaintiff properly joined her wrongful death claim with her insurance claims against American Family. State ex rel. Smith v. Gray, 979 S.W.2d 179(Mo.banc 1979).

A. PLAINTIFF HAD A VALID CAUSE OF ACTION AGAINST AMERICAN FAMILY FOR EITHER UNINSURED MOTORIST BENEFITS, MEDICAL PAYMENT BENEFITS OR ACCIDENTAL DEATH BENEFITS.

1. UNINSURED MOTORIST BENEFITS

On December 10, 1998, Plaintiff notified American Family that Plaintiff was making a claim under the uninsured motorist (UM) provisions of Decedent's insurance policy with American Family. (Appendix A55, Letter dated December 10, 1998).

In a letter dated December 21, 1998, American Family denied Plaintiff's UM claim, relying on its policy language. (Appendix A56, Letter dated December 21, 1998). In American Family's letter, it was suggested that the following exclusion applied:

> Uninsured Motorist Coverage shall not apply to the benefit of any insurer or self-insurer under the workers' compensation or disability benefits law
>
> or any similar law.

The UM portion of the American Family policy provides in part:

PART III - UNINSURED MOTORIST COVERAGE

> You have this coverage if Uninsured Motorist Coverage is shown in the declarations.
>
> > We will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. The bodily injury must be sustained by an insured person and must be caused by accident and arise out of the use of the uninsured motor vehicle.
> >
> > (Appendix A41-A50, American Family Policies, page 3 of 6)
> >
> > **ADDITIONAL DEFINITIONS USED IN THIS PART ONLY**
> >
> > * * *
> >
> > **2. Motor vehicle means a land motor vehicle or a trailer. But, it does not mean a vehicle:**
> >
> > **a. Operated on rails or crawler-treads.**

b. Which is a farm-type tractor or equipment designed for use mainly off public roads, while so used.

c. Parked for camping or housekeeping purposes.

(Appendix A41-A50, American Family Policies, page 4 of 6)

Plaintiff asserted her UM claim in Count X of her Petition. (Appendix A57-A76, Plaintiff's Petition, Count X). At the time suit was filed, Plaintiff had a realistic belief that a UM claim could be made against American Family since the Ford Explorer involved in the death of Decedent fit the description of an uninsured motor vehicle under the definition in American Family's policy.

American Family never moved to transfer venue within the time prescribed by Rule 51.045 MRCP. American Family never claimed that the Ford Explorer was not a motor vehicle under the terms of its policy until the court urged it to file a Motion to Dismiss and even then American Family merely adopted Ford's argument that the Explorer was not a motor vehicle. This Court should determine whether the defense that the Ford Explorer was not a motor vehicle should have been considered at all by the trial court or whether American Family was estopped from raising the defense because it did not raise it in its letters of denial. It is a general rule of law that, having denied liability for a stated reason, an insurer may not, later assert a different one. State Farm Mutual Automobile Insurance Company v. Central Surety and Insurance Corporation, 405 S.W.2d 530(Mo.App.W.D. 1966); Century Fire Sprinklers, Inc. v. CNA/Transportation Insurance Company, 23 S.W.3d 874(Mo.App.W.D. 2000).

(a) **THE FORD EXPLORER WHICH KILLED DECEDENT IS A "MOTOR VEHICLE" AS DEFINED BY AMERICAN FAMILY'S POLICY.**

Viessman v. Allstate Insurance Company, 825 S.W.2d 349(Mo.App.S.D., 1992) provides the analysis the court must make in determining whether American Family's UM policy provides coverage to Plaintiff.

> In any given case, whether or not uninsured motor vehicle insurance is applicable in the first instance, is a matter of construction of the insurance contract.
>
> * * *
>
> Appropriate rules for guidance in that construction are well established… It is sufficient to observe, where language in an insurance contract is unequivocal, it is to be given its plain meaning . . . .
>
> An uninsured motor vehicle is one which is not insured. When language is plain, straight-forward and susceptible of only one meaning there is no room for judicial construction because there is nothing to construe.

Viessman at 351.

The American Family policy defines "motor vehicle" as follows:

> **2. Motor vehicle means a land motor vehicle or a trailer.**

The Ford Explorer involved in this accident meets this definition.

In McKee v American Family Mutual Insurance Company, 932 S.W.2d 801 (Mo.App.E.D. 1996), American Family asserted that an "inoperable" van lacking a transmission was in fact a "motor vehicle" within the meaning of its automobile

insurance policy. The Court found that the van though lacking a transmission and therefore "inoperable" was indeed a "motor vehicle" for purposes of underinsured motorist coverage, stating:

> Given the facts of this case the trial court did not err in finding that Plaintiff's van was a motor vehicle under the terms of mother's policy . . . At the time of the accident, the van required only minor repairs that Plaintiff could have accomplished at minimal cost and effort to him . . . Plaintiff admitted that at all times he possessed the van, his intention was to get it operational for use on public streets. Id. at 803.

In Stronger v. Riggs, 85 S.W.3d 703(Mo.App.W.D. 2002), the court determined that a riding lawn mower being driven on the street was a “motor vehicle” as the term is used in Section 304.012 R.S.Mo. observing that Section 304.010 (33) R.S.Mo. defines “motor vehicle” as “any self-propelled vehicle not operated exclusively upon tracks except farm tractors” and that Section 301.010(64) R.S.Mo. defines “vehicle” as any [1] mechanical device on wheels, [2] designed primarily for use, or [3] used, on highways except motorized bicycles . . . “ Id. at 707.

In this case, Relators asserted that the Ford Explorer was **not** a "motor vehicle" because it was "inoperable". This argument was disingenuous. In fact, the police report and witness statements prove that the Ford Explorer was operable. The photographs of the Explorer show a fully assembled and operable motor vehicle. (Appendix A33-A40, Photographs of the Ford Explorer). The vehicle could not have taken off and killed the Decedent if it had not been operable.

Missouri Courts have allowed recovery in UM cases where the accidents occurred in a driveway or a parking lot and not on a public highway. In Keeler v. Farmers and Merchants Insurance Company, 724 S.W.2d 307(Mo. App. S.D. 1987), the Court affirmed a jury verdict in favor of a Plaintiff on her UM claim where she had been intentionally rammed by another vehicle while still in her **driveway**. In Thornburg v. Farmers Insurance Company, 859 S.W.2d 847 (Mo.App.W.D. 1993), the Court allowed an UM case to be brought against the insurer where the Plaintiff had been dragged along side a car in a **parking lot**. Clearly, Missouri Courts have allowed UM claims to proceed against insurers where the accident complained of occurred on private property instead of a public highway.

In the final analysis, the court must look at the insurance policy language to determine whether UM coverage exists. An insurance policy may provide more coverage than is required by law. The trial court should have looked at the ordinary meaning of "motor vehicle" which is "any mechanical device on wheels designed primarily for use on highways" or "a vehicle with a motor that travels on land or any motor driven conveyance for transporting people or things on land." See Bourgon v. Farm Bureau Mut. Ins. Co., 128 Vt. 593; 270 A.2d 151(Vt.Sup.Ct. 1970); Thedin v. U.S. Fidelity & Guar. Ins. Co., 518 N.W.2d 703(N.D.Sup.Ct. 1994); Trierweiler v. Frankenmuth Mutual, 216 Mich.App. 653; 550 N.W.2d 577(Mich.Ct.App. 1996); and Farm Bureau Mutual Ins. Co. v. Stark, 437 Mich 175, 183; 468 N.W.2d 498(Mich.1991). Judge Neill incorrectly relied on the Motor Vehicle Financial Responsibility Law (MVFRL) and public policy when she should have concerned herself only with the insurance policy.

American Family's denial in its letter of December 21, 1998 on the basis of a workers compensation exclusion is not allowable under Missouri law. (Appendix A56, Letter dated December 21, 1998). Such an exclusion would not prevent Plaintiff from making a claim for uninsured motorist coverage under American Family's policy of insurance because this exclusion could never "work to the benefit of any insurer". Yaakub v. Aetna Casualty & Surety Co., 882 S.W.2d 743 (Mo.App. E.D. 1994) prohibits the workers compensation carrier from obtaining subrogation in a UM claim and thus prohibits UM coverage from working "to the benefit of any insurer". Therefore, Plaintiff had a realistic belief, under the holding of Yaakub, that American Family's exclusionary language was unenforceable and could not defeat Plaintiff's UM claim.

Furthermore, Ford asserted in its Motion to Transfer that it was self-insured and therefore American Family's UM policy did not apply. (Appendix A103-A111, Ford's Motion to Transfer for Improper Venue). Ford filed an affidavit of a Ford employee which merely made the conclusory statement that Ford was self-insured. Ford offered no evidence that it had obtained a certificate of self-insurance as required by Section 303.160(1)(4) R.S.Mo. In fact, Plaintiff filed a letter from the Missouri Department of Revenue advising that it had no record of Ford having obtained a certificate of self-insurance. (Appendix A112, Letter dated April 11, 2002 from Missouri Department of Revenue).

For the foregoing reasons, Plaintiff did have a valid uninsured motorist claim against American Family and this Court should consider whether it can reinstate Plaintiff's UM claim.

2. <u>MEDICAL PAYMENT BENEFITS</u>.

Plaintiff asserted a claim for medical expense coverage in Count XI of her Petition. (Appendix A57-A76, Plaintiff's Petition, Count XI). At the time of filing her lawsuit, Plaintiff had a realistic belief that under the law and evidence that she had a valid claim for medical expense coverage under American Family's policy. On September 23 and December 10, 1998, prior to the filing of Plaintiff's lawsuit, Plaintiff asserted a claim against American Family for medical expense coverage. (Appendix A51, A55, Letters dated September 23, 1998 and December 10, 1998). On October 12, 1998, American Family via letter to Plaintiff denied medical expense coverage citing exclusionary language contained in its policy, stating:

> However, EXCLUSIONS state:
>
> This exclusion (sic) does not apply for bodily
>
> Injury to any person:
>
> 6. During the course of employment **if benefits are payable** or must be provided under the **workers compensation** or disability benefits law or any similar law.
>
> (Appendix A52-A53, Letter dated October 12, 1998).

American Family's policy, Part II - MEDICAL EXPENSE COVERAGE also provides in part:

> **You have this coverage if medical expense coverage is shown in the declaration page. We will pay reasonable medical expenses for appropriate and necessary medical or funeral services performed within one year of the accident because of an accident related bodily injury to an insured person.**

American Family's denial on the basis of a workers compensation exclusion is not supported under the law of Missouri. In fact, in Plaintiff's letter of December 1, 1998, Plaintiff's counsel advised:

> **The research I have done appears that the Workers' Comp exclusion on med-pay may not be enforceable (See State Farm v. Ley, 844 S.W.2d 70). Obviously, we will be making a claim against American Family, but we need to decide if it will be helpful to join them in the wrongful death lawsuit**.
>
> (Appendix A54, Letter dated December 1, 1998).

The exclusion referred to by American Family would not prevent Plaintiff from making a claim for medical expense coverage. This exclusion is not valid under Missouri law, as the language contained in the policy is vague and ambiguous. See State Farm Mutual Automobile Insurance Company v. Ley, 844 S.W.2d 70 (Mo.App. E.D. 1992) and Walters v. State Farm Mutual Automobile Insurance Company, 793 S.W.2d 217 (Mo.App. S.D. 1990) where such an exclusion was held to be invalid. The exclusionary language "**to the extent workers compensation benefits are required to be payable**" was condemned as having "uncertainty of meaning," being indistinct, ambiguous, and unenforceable.

The holdings in these cases show that the language in the American Family med-pay exclusion "**if benefits are payable . . . under the workers compensation law**" is not enforceable and would not prohibit Plaintiff from making a valid claim for medical expense under American Family's policy.

After suit was filed, American Family further asserted that the Ford Explorer that struck Decedent was not a “highway vehicle”. The term "highway vehicle" is not defined under the terms of the American Family insurance policy and is ambiguous.

Judge Neill found the term "highway vehicle" to be ambiguous stating that "it is unclear from the policy whether the term 'highway vehicle' refers to a vehicle operated on a highway, subject to being operated on a highway, or merely designed for highway use." (Appendix A5-A17, Order and Partial Judgment dated November 18, 2002). When ambiguous provisions are found in an insurance contract, those provisions are construed against the insurer. Behr v. Blue Cross Hosp. Serv., Inc., 715 S.W.2d 251, 255(Mo.banc 1986). Therefore, the ambiguity of the term "highway vehicle" is to be construed against American Family and would not prohibit Plaintiff from making a valid claim for medical expense coverage under American Family's policy.

Stronger v. Riggs, 85 S.W.3d 703(Mo.App.W.D. 2002), which determined that a riding lawn mower being driven on the street was a “motor vehicle” as the term is used in Section 304.012 R.S.Mo. noted that Section 304.010 (33) R.S.Mo. defines “motor vehicle” as “any self-propelled vehicle not operated exclusively upon tracks except farm tractors” and that Section 301.010(64) R.S.Mo. defines “vehicle” as any [1] mechanical device on wheels, [2] designed primarily for use, or [3] used, on highways except motorized bicycles . . . “ Id. at 707. In determining that the mower met the definition of “vehicle” under Section 301.010(64) R.S.Mo. , the court ruled “thus, if the lawn mower was either ‘designed primarily for use’ or used on a road or highway, it will fit within this definition”. Id. at 708. Therefore, the Ford Explorer which was “designed primarily for

use” on a road or highway meets the definition of “highway vehicle” as it is commonly understood and used.

The holdings in the cases cited above demonstrate that Plaintiff has a valid medical expense claim and that under the law and the evidence, the exclusion "if benefits are payable . . . under the workers compensation law" was not enforceable and would not prohibit her from recovering medical expenses under American Family’s policy.

3. ACCIDENTAL DEATH BENEFITS.

Plaintiff sued for accidental death benefits in Count XII of her Petition. (Appendix A57-A76, Plaintiff's Petition, Count XII). On September 23 and December 10, 1998, prior to the filing of Plaintiff’s lawsuit, Plaintiff asserted a claim against American Family for accidental death benefits. (Appendix A51, A55, Letters dated September 23, 1998 and October 10, 1998). On October 12, 1998, American Family in a letter to Plaintiff admitted "Our insured also had Accidental Death and Specific Dismemberment Benefits Coverage Endorsement of $10,000.00." The policy provided: (a) Death Benefit: We will pay the maximum benefit shown in the Declaration if the insured person dies with ninety days of the accident. However, American Family advised of exclusions in the endorsement and stated "We are in need of a full detailed report from his employer, Ford in order to fully determine whether this coverage applies." (Appendix A52-A53, Letter dated October 12, 1998). The exclusionary language of the policy on its face does not apply.

The language reads as follows:

> This coverage **does not apply to**:
>
> 2. Bodily injury or **death sustained** in the course of any occupation **by an insured person while engaged in the duties involving** the:
>
> a. **operation, loading, or unloading of vehicle used to carry persons or property for the charge or a commercial vehicle**.
>
> b. **repair or servicing of vehicles**.
>
> * * *
>
> 6. Bodily injury or death sustained while occupying or when struck by:
>
> a. a vehicle on rails or crawler treads
>
> b. a farm type tractor or equipment designed for use off public roads, while so used
>
> c. a vehicle or trailer while parked for camping or housekeeping purposes
>
> d. a vehicle while preparing for or taking part in a prearranged or organizing racing or speed contest.
>
> 8. Bodily injury or death sustained while occupying a motorized vehicle with less than four wheels." (Appendix A52-A53, Letter dated October 12, 1998).

At the time of his death, "the insured person", Benjamin Pierce was an innocent bystander and was not involved in any of the activities described under the above exclusions. The Ford Explorer was not "used to carry persons or property for a charge or commercial vehicle" and the "insured person" was not "engaged in the duties involving . . . repair or servicing of vehicles." American Family never denied coverage on the basis that the Ford Explorer was not a "land motor vehicle" prior to filing suit. In fact, that definition was not even referred to in American Family's letter. (Appendix A52-A53, Letter dated October 12, 1998). However, the Court properly ruled that the term "land motor vehicle" is ambiguous in the same manner as the term "highway vehicle". Clearly, the Ford Explorer was a vehicle designed for land use. Moreover, the vehicle does not appear to fall within the vehicles excluded from Accidental Death Coverage in paragraphs 6 and 8 set out above. Therefore, Plaintiff had a realistic belief under the law and the evidence that a valid accidental death claim existed. Moreover, Stronger v. Riggs, 85 S.W.3d 703(Mo.App.W.D. 2002), discussed above, in determining that the mower met the definition of "vehicle" under Section 301.010(64), ruled "thus, if the lawn mower was either 'designed primarily for use' or used on a road or highway, it will fit within this definition". Id. at 708. Therefore, the Ford Explorer which was "designed primarily for use" on a road or highway meets the definition of "land motor vehicle" as it is commonly understood and used.

Other jurisdictions have examined the definition of "land motor vehicle" in situations similar to the instant case. In Bourgon v. Farm Bureau Mut. Ins. Co., 128 Vt. 593; 270 A.2d 151(Vt.Sup.Ct. 1970), the Plaintiff sued for death benefits after the

insured drowned when the "bush-buggy" he was driving on the frozen surface of the lake went through the ice. The "bush-buggy" was actually a stripped-down Volkswagon which was not registered and could not pass the Vermont motor vehicle inspection requirements. It was not ordinarily operated on the highways, but in woodland areas, and was towed from place to place over the highway.

The insurer denied coverage because it found that the "bush-buggy" was not an automobile which was defined as "a land motor vehicle or trailer . . .". The trial court found that the "bush-buggy" was definable as a "land motor vehicle" not operated on rails or treads, originally designed for highway use, although in its later condition intended for use principally off public roads and found there was insurance coverage. The court held "We cannot construe the policy definitions so narrowly, that the mere fact that a vehicle, because of some minor defect, could not pass inspection, would be enough to bar recovery. As we view it, there must be a substantial change in identity from a motor vehicle in the usual sense to equipment designed for use principally off public roads. Unquestionably, this vehicle was originally designed as an ordinary automobile. This identity it had not truly lost in modification, it has simply been stripped down for its new "bush-buggy" use. Its unavailability for ordinary highway use was not due to any basic structural change but rather to its equipment shortcomings. In this view of the matter, it was a "land motor vehicle" within the contemplation of the policy." Id. at 594-95.

Thedin v. U.S. Fidelity & Guar. Ins. Co., 518 N.W. 2d 703(N.D.Sup.Ct. 1994), concerned an accident involving a combine. The operator of the combine sued his insurance company under the uninsured motorist provisions of his policy. The trial court

granted the insurance company's motion for summary judgment concluding that the combine was not an uninsured motor vehicle under the policy.

Under the policy, an uninsured motor vehicle was defined as "a land motor vehicle". The term "a land motor vehicle" was not defined in the policy. The court wrote "Our review of relevant case law demonstrates there is really no dispute that the terms 'motor vehicle' and 'land motor vehicle' are very broad in meaning and, when not accompanied by explicit exclusions or limiting language, result in broad insurance coverage. . . . Although Guaranty defines uninsured motor vehicle as a land motor vehicle, it does not define the latter term under the policy. When an insurer fails to define a term it is given its ordinary meaning, not a restrictive one. . . Within the context of this comprehensive custom combine insurance policy, we conclude that the common, ordinary meaning of land motor vehicle encompasses any motor driven conveyance for transporting people or things on land. Consequently, we further conclude that, as a matter of law, the combine which injured Thedin is a land motor vehicle covered under the uninsured motorist endorsement of Jacobsen's policy." Id. at 706.

In Trierweiler v. Frankenmuth Mutual, 216 Mich.App. 653; 550 N.W.2d 577 (Mich.Ct.App. 1996), the plaintiff was a passenger on a farm tractor owned and operated by his father. He was injured by the driver of a vehicle which crashed into the rear of the tractor, causing severe injuries to plaintiff. He settled his civil lawsuit against the driver for the driver's policy limits of $50,000 but plaintiff's injuries were far in excess of $50,000. He brought suit under his father's policy for underinsurance benefits. Coverage

was denied because the tractor was a "land motor vehicle". Plaintiff contended that the tractor was not a "land motor vehicle" under the terms of the policy.

The exclusionary language relied on by the insurer was: "We do not provide underinsured motorist coverage for bodily injury sustained by any person: 1. While occupying, or when struck by, an land motor vehicle . . ."

The phrase "land motor vehicle" was not defined in the policy. The court held that the fact that the policy does not include a definition of "land motor vehicle" does not create an ambiguity. The court cited the case of Farm Bureau Mutual Ins. Co. v. Stark, 437 Mich. 175, 183; 468 N.W.2d 498(Mich.1991) where the court found that when the phrase "land motor vehicle" taken and understood in its plain, ordinary, and popular sense, would include a moped and that a "land motor vehicle" simplistically described, is a vehicle with a motor that travels on land." Trierweiler at 658. Based upon this interpretation of "land motor vehicle", that court found that a farm tractor was a land motor vehicle because it had a motor and traveled across the land.

Therefore, even if no ambiguity existed, using the ordinary meaning of “land motor vehicle” which is a vehicle with a motor that travels on land or any motor driven conveyance for transporting people or things on land, the Ford Explorer is a “land motor vehicle” for purposes of American Family’s accidental death coverage.

In addition, American Family in its Motion to Dismiss denied that it ever provided Accidental Death coverage to Plaintiff or Decedent. (Appendix A91-A99, American Family's Motion to Dismiss). This was contradicted by Plaintiff's insurance policies filed with the court and American Family's own letter of October 12, 1998 admitting "**Our**

insured also had Accidental Death and Specific Dismemberment Benefits Coverage Endorsement of $10,000.00." (Appendix A41-A50; A52-A53, American Family Insurance policies and Letter dated October 12, 1998). For the foregoing reasons, Plaintiff has a valid accidental death claim against American Family.

B. PLAINTIFF HAD A REALISTIC BELIEF UNDER THE LAW AND EVIDENCE THAT A VALID CLAIM EXISTED AGAINST AMERICAN FAMILY.

In State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994), the Missouri Supreme Court held that Venue is pretensive if (1) the petition on its face fails to state a claim against the [joined] defendant; or (2) the petition does state a cause of action against the [joined] defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the [joined] defendant *and* that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the [joined] defendant. State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 527(Mo.banc 1994) (quoting State ex rel. Toastmaster v. Mummert, 857 S.W.2d 869, 870-71(Mo.App.E.D. 1993). Id.

The standard is an objective one, appropriately denominated as *a realistic belief that under the law and evidence* a [valid] claim exists. State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996).

An examination of Plaintiff's Petition on its face indicates that it does state a cause of action against the resident Defendant American Family for UM, medical payment, and

accidental death benefits. Since the Petition on its face states a cause of action against American Family, Relators must prove that there is in fact no cause of action against American Family and that the information available at the time the Petition was filed would not support a reasonable legal opinion that a case could be made against American Family. The facts and the law set forth above indicate that Plaintiff had a reasonable legal opinion that a case could be made against American Family. The new defense raised after suit was filed that the Ford Explorer was not a "motor vehicle" does not change the fact that Plaintiff had a realistic belief under the law and evidence that a valid claim existed.

C. AMERICAN FAMILY HAS NEVER FILED A MOTION TO TRANSFER FOR IMPROPER VENUE AND THEREFORE HAS WAIVED ANY CHALLENGE TO VENUE.

American Family was served with Plaintiff's Petition on March 20, 2001. American Family filed its Answer to Plaintiff's Petition on April 10, 2001. (Appendix A113-A120, Answer of American Family). However, American Family did not file a Motion to Dismiss or Motion to Transfer for Improper Venue within thirty days of service. Eventually, on May 23, 2002, American Family did file a Motion to Dismiss the various claims against it, but has never filed a Motion to Transfer for Improper Venue.

Under Rule 51.045 MRCP, a motion to transfer venue shall be filed (a) within the time allowed for responding to an adverse party's pleading, or (b) if no responsive pleading is permitted, within thirty days of service of the last pleading. If a motion to transfer venue is not timely filed, the issue of improper venue is waived. Venue will be

waived unless challenged at the first opportunity. State ex rel. Antoine v. Sanders, 724 S.W.2d 502, 504(Mo.banc 1987); State ex rel Uptergrove v. Russell, 871 S.W.2d 27, 29(Mo.App.W.D. 1993); Rule 51.045 MRCP.

Therefore, American Family has waived its objection to venue because it never filed a Motion to Transfer for Improper Venue and has no standing to challenge venue in this Petition for Writ of Prohibition.

D. RELATORS FORD, KING, GENSLER AND HITT FILED THEIR MOTION TO TRANSFER FOR IMPROPER VENUE OUT OF TIME IN VIOLATION OF RULE 51.045 MRCP AND THEREFORE VENUE IS WAIVED.

Ford and King, Gensler and Hitt (The Co-employees) filed their Motion to Transfer for Improper Venue out of time and therefore do not now have standing to assert that venue is pretensive. Venue will be waived unless challenged at the first opportunity. State ex rel. Antoine v. Sanders, 724 S.W.2d 502, 504(Mo.banc 1987); State ex rel Uptergrove v. Russell, 871 S.W.2d 27, 29(Mo.App.W.D. 1993); Rule 51.045 MRCP. Ford and The Co-employees have waived their objection to venue because their Motion to Transfer for Improper Venue was not timely filed pursuant to Rule 51.045 (a) MRCP.

Plaintiff's Petition (Cause No. 012-00563) was filed on February 21, 2001. Ford and The Co-employees accepted service by mail and were served on or about February 28, 2001. Ford and The Co-employees filed their Answers to Plaintiff's Petition on April 2, 2001. Relators did not file their Motion to Transfer on April 2, 2001 in this case as they allege, rather they filed their Motion to Transfer in this case on August 23, 2001.

Mariano Favazza, Circuit Clerk for the City of St. Louis, has reviewed the court files and has determined that on April 2, 2001 Ford and The Co-employees filed a Motion to Transfer for Improper Venue in a previously filed and closed case, bearing a different cause number, Cause No. 992-07640. Mr. Favazza also determined that on August 23, 2001, the Motion to Transfer was subsequently removed from the closed file bearing Cause Number 992-07640 and placed in the instant file bearing Cause Number 012-00563 and that while this Motion now bears a "minute date" of April 2, 2001, the computer "minute entry" date for this motion is August 23, 2001. (Appendix A78-A81, Affidavit of Mariano Favazza, Circuit Clerk). Plaintiff also filed proof with the trial court that in fact, it was only after Plaintiff's counsel advised Ford in a letter dated July 31, 2001 that a search of the court file had revealed that no Motion to Transfer had been filed and provided the Circuit Clerk's minutes to that effect, that Ford and The Co-employees purported to file a Motion to Transfer in this case without serving a copy on or giving notice to Plaintiff. (Appendix A82-A83, Letter dated July 31, 2001). The Circuit Clerk minutes dated July 31, 2001, and sent with Plaintiff's letter to Ford clearly indicate that no Motion to Transfer had been filed in Cause No. 012-00563 as of July 31, 2001. (Appendix A84-A90, Circuit Clerk Minutes dated July 31, 2001). A review of the court file suggests that the Motion to Transfer filed in Cause No. 992-07640 was mysteriously removed and that the old Cause No. was scratched out and the new Cause No. 012-00563 was written in. (Appendix A103-A111, Motion to Transfer for Improper Venue). Moreover, the minutes were "back-dated" to reflect that the Motion had been filed on April 2, 2001, however, the "computer entry date" indicates that this was actually filed on

August 23, 2001. This was apparently accomplished with the assistance of a lower level court clerk, without leave of court or notice to Plaintiff.

Therefore, Relators Ford, King, Gensler and Hitt filed their Motion to Transfer for Improper Venue out of time and have therefore waived their challenge to venue.

CONCLUSION

For the reasons set forth above, Respondent did not err in refusing to dismiss Plaintiff's medical payment and accidental death claims against American Family and refusing to transfer this cause of action to St. Louis County. However, the trial court did improperly dismiss Plaintiff's uninsured motorist cause of action because the Ford Explorer could reasonably be considered a "motor vehicle" under the terms of the policy and the reasonable understanding of those words. Plaintiff had valid claims under the UM, medical payment, and accidental death provisions of American Family's policies. Moreover, the facts and law cited above support Plaintiff's realistic belief under the law and evidence that she had valid insurance claims against American Family.

WHEREFORE, Respondent respectfully requests (1) that this Court quash and dissolve its Preliminary Writ of Prohibition; (2) Order reinstatement of Plaintiff's uninsured motorist claim; (3) allow this cause of action to continue in the Circuit Court of the City of St. Louis; (4) permit Respondent to take further action in this case and (5) issue such further Orders as the Court may deem just and proper.

Respectfully Submitted,

CERVANTES & ASSOCIATES

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing was mailed via first class mail, postage prepaid, this 22nd day of August, 2003: Mr. Robert T. Adams, Mr. Paul Williams, Mr. Douglas W. Robinson, Shook, Hardy & Bacon LLP, One Kansas City Place, 1200 Main Street, Kansas City, MO 64105, Attorneys for Relators Ford Motor Company, Kenneth King, Billy Gensler, and Charles Hitt; and Mr. Robert Danis, 1807 Park 270, Suite 200, St. Louis, MO 63146, Attorney for Relator American Family Insurance Company.

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CERTIFICATE PURSUANT TO RULE 84.06(C)

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the requirements of Rule 84.06(b) and contains 8,536 words. The undersigned further certifies that the enclosed disk has been scanned for viruses and is virus free.

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